

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

U.S. BANKRUPTCY COURT X
NORTHERN DISTRICT OF IOWA

APR 22 1994

BARBARA A. EVERLY
CLERK

In re:

FRANCIS A. TUNINK and
JOAN F. TUNINK,

Chapter 7

Bankruptcy No. 93-50528XS

Debtors.

DONALD H. MOLSTAD, Trustee,

Plaintiff,

Adversary No. 93-5178XS

vs.

JOYCE A. MASCHING,

Defendant.

JUDGMENT

This proceeding having come on for trial or hearing before the court, the Honorable William L. Edmonds, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED: that Joan F. Tunink's beneficial interest in the trust created by her on December 11, 1985 is property of the estate. Joyce A. Masching shall deed or otherwise turn over Joan F. Tunink's interest in the trust to Donald H. Molstad, bankruptcy trustee.



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BARBARA A. EVERLY
Clerk of Bankruptcy Court

By: *Larry Slay*
Deputy Clerk

[Seal of the U.S. Bankruptcy Court]
Date of Issuance: April 22, 1994

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

BARBARA A. EVERLY, CLEVA

[illegible]

Adversary No. 93-5178XS

AO 72A
(Rev. 8/82)

On December 11, 1985, Joan Tunink transferred her remainder interest to a trust and named Joyce Masching as trustee. The trust agreement stated:

SECTION 1. Trustor [Joan Tunink] hereby transfers and delivers to Trustee [Joyce Masching], in trust, all of the property described in Exhibits "A", "B" and "C" attached hereto and made a part hereof by this reference, the receipt of which property is acknowledged by Trustee. Such property shall constitute the trust estate, and shall be held, administered, and distributed by Trustee as herein provided.

Both the Trustor and the Trustee understand that the trust estate consists of a remainder interest in the real and personal property which Trustor receives as a legatee under the Will of Alphonse M. Kerkhoff, Deceased, being probated in the District Court of Carroll County, Iowa, as Probate No. 13471, and, that Frances Kerkhoff, as the surviving spouse of said Alphonse M. Kerkhoff, owns a life estate in the trust property and will be in possession of the same during her lifetime and that until the life estate of Frances Kerkhoff is terminated, the Trustee's only duty with respect to said property will be to protect and preserve the remainder interest of the Trustor in said trust property.

When the life estate of Frances Kerkhoff is terminated, the Trustee shall then hold, manage, invest, and reinvest the trust estate, and shall collect the income thereof and dispose of the net income and principal in the following manner:

The Trustee shall distribute such amount of the net income of the trust estate to the Trustor from time to time as in her opinion it is needed by the Trustor and any undistributed net income in any year shall be added to the principal of the trust estate.

The payments of income to the Trustor shall be during her lifetime and upon her death, the Trustee may pay the expenses of Trustor's last illness and funeral from the trust estate. After payment of such expenses, the trust shall continue and the remaining net income and principal of the trust estate shall be distributed to Francis Tunink, the husband of Trustor, under the same terms and conditions as the distributions were made to Trustor personally, for his lifetime. Upon the death of the said Francis Tunink, and if the Trustee is

still acting, said Trustee may pay the expenses of the last illness and funeral of Francis Tunink from the trust estate.

My Trustee shall then convert the trust assets to cash and shall distribute one-fourth thereof to my daughter, Barbara Woodhead, or the heirs of her body; and one-fourth thereof to my daughter, Jean Watters or the heirs of her body; and one-fourth thereof to my son, Curtis Tunink, or the heirs of his body; and one fourth thereof to my daughter, Karen Tunink, or the heirs of her body.

If at any time the Trustee deems that the interest of the Trustor would be served, she shall have the sole and absolute discretion to pay any or all of the principal to the Trustor.

During the period of the trust, neither the Trustor nor the said Francis Tunink shall have the right to anticipate any of the principal or income thereof for loans or assignments as the basis for securing credit for themselves, but the same shall be free from any of the claims or debts of said Trustor or the said Francis Tunink, which either of them may have incurred or be personally liable for.

If any (sic) at time during the existence of the within trust, said Trustee becomes convinced that Trustor has become capable of managing her own affairs, she shall have the right to terminate the trust and pay the assets in her possession to the Trustor.

Trustee's Affidavit, Exhibit A. Frances Kerkhoff, the life tenant of the trust estate, is still living. Joyce Masching, the trustee, is Joan Tunink's sister; she has made no distributions of trust property to Joan Tunink.

Discussion

Summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c), made applicable in bankruptcy adversary proceedings by Fed.R.Bankr.P.

7056. The parties agree there are no issues of material fact. The court finds the matter is ripe for summary judgment.

The trustee alleges that because Joan Tunink created the trust for her own benefit, the trust is invalid, and the trust estate is property of the bankruptcy estate. The bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case, wherever located and by whomever held. 11 U.S.C. § 541(a)(1). A debtor's beneficial interest in a spendthrift trust enforceable under state law is excluded from property of the estate by § 541(c)(2). A spendthrift trust is one which imposes a valid restraint on the voluntary and involuntary transfer of the beneficiary's interest. In re Tone's Estates, 240 Iowa 1315, 39 N.W.2d 401, 407 (1949). The trust agreement quoted above contains a spendthrift clause to the effect that neither Joan Tunink nor Francis Tunink may assign or encumber their interest in the principal or income of the trust property and that the property shall be free from the claims of creditors.

The trust agreement gives Joyce Masching discretion to distribute the income of the trust estate to Joan Tunink "as needed." The trust agreement also states:

If at any time the Trustee deems that the interest of the Trustor would be served, she shall have the sole and absolute discretion to pay any or all of the principal to the Trustor.

These provisions show an intent to create either a trust for support or a discretionary trust. A discretionary trust is one which gives the trustee unlimited discretion to determine the

time, amount or manner of payments to the beneficiary. Tone's Estates, 39 N.W.2d at 408; In re Estate of Dodge, 281 N.W.2d 447, 450 (Iowa 1979); Restatement (Second) Trusts § 155 (1959). A trust for support is one which grants the trustee discretion in carrying out the purpose of the trust which is to support the beneficiary. Dodge, 281 N.W.2d at 450; Restatement (Second) Trusts § 154. In a discretionary trust or trust for support, the trust estate is protected from the beneficiary's creditors by the nature of the beneficiary's interest rather than a provision restricting transfer of the beneficiary's interest. Creditors cannot reach assets of the estate because the beneficiary cannot compel the trustee to make payments from the trust property. Tone's Estates, 39 N.W.2d at 408; Restatement (Second) Trusts § 154 comment b, § 155(1) comment b.

Spendthrift provisions in trust instruments are generally valid in Iowa. Dodge, 281 N.W.2d at 450. Discretionary trusts and trusts for support also are generally valid. Id.; Tone's Estates, 39 N.W.2d at 407-08. However, when a settlor creates for her own benefit a spendthrift trust, a discretionary trust, or a trust for support, creditors may reach assets of the trust estate. Hanson v. Minette, 461 N.W.2d 592, 596 (Iowa 1990); Coster v. Crookham, 468 N.W.2d 802, 808 (Iowa 1991); Restatement (Second) Trusts § 156. In Coster v. Crookham, the court stated the rule:

1. Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.

2. Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

468 N.W.2d 808-09 *quoting* Restatement (Second) of Trusts § 156.

Joan Tunink is the settlor of the trust. The court concludes that she created the trust for her own benefit. The trust provides that Masching is to distribute income from the trust property to Joan Tunink during her lifetime. The trust grants Masching the discretion to pay all of the principal to Joan Tunink as well. Masching is expressly given the power to terminate the trust and pay the trust assets to Joan Tunink. The trust provides for no distribution to anyone else during the lifetime of Joan Tunink. A person who receives the income from trust property is a beneficiary of the trust even when other persons may receive the trust property upon the beneficiary's death. See Harrison v. City National Bank of Clinton, 210 F.Supp. 362, 370 (S.D. Iowa 1962). The trust created by Joan Tunink goes one step further. She has the potential to receive the entire trust corpus during her lifetime.

Although Joan Tunink's children may have a contingent interest in the trust, the trust property is property of the bankruptcy estate. In In re Frangos, 132 B.R. 723 (Bankr. N.D. Ohio 1991), supplemented by 135 B.R. 272 (1992), the debtors created a trust under which the trustee held property "for the benefit of" the debtors. Upon their deaths, the property was to be given to the debtors' children. The court found there were

no limitations on the "benefit" the debtors could receive from the trust. The court concluded that the debtors' children did not have a vested remainder interest that could be excluded from the bankruptcy estate. The trust corpus was held property of the estate. Frangos, 132 B.R. at 724. The trust in Robbins v. Webster (In re Robbins), 826 F.2d 293 (4th Cir. 1987), contained terms similar to those in the trust created by Joan Tunink. The trust income in Robbins was payable to the debtors during their lifetime, and upon their deaths, remaining trust assets were to be distributed to their children. The trustee also had the power to distribute the entire corpus to the debtors for their support. The court found that the debtors had created the trust for their own benefit and that the entire corpus was subject to the claims of creditors. Id., 826 F.2d at 295.

The trust created by Joan Tunink is a self-settled trust within the rule of § 156 of the Restatement. The spendthrift provisions of the trust are ineffective, and creditors can reach Joan Tunink's interest in the trust. Coster v. Crookham, 468 N.W.2d at 808; In re Schwartz, 58 B.R. 606, 607 (Bankr. N.D. Iowa 1984); Restatement (Second) Trusts § 156(1). The trust is not within the exception of 11 U.S.C. § 541(c)(2) and is property of the estate.

The trust also contains language which appears to create either a discretionary trust or a trust for support. It is unnecessary for the court to determine which type of trust the trust is, because the rule under § 156(2) of the Restatement is

the same for either type of trust. When a person creates a discretionary trust or trust for support for her own benefit, creditors can reach the maximum amount which the trustee under the terms of the trust could pay her or apply for her benefit. Hanson v. Minette, 461 N.W.2d 592, 596 (Iowa 1990); Restatement (Second) Trusts § 156(2). The trust authorizes Masching to dissolve the trust or distribute all principal to Joan Tunink. The entire corpus is available for creditors. Robbins, 826 F.2d 293, 295.

Neither the spendthrift provisions nor the discretionary language of the trust are enforceable restrictions on the transfer of Joan Tunink's interest in the trust assets. Therefore, all of Joan Tunink's remainder interest in the real and personal property which she received under the will of Alphonse M. Kerkhoff is property of her bankruptcy estate. She must surrender the property to the trustee. 11 U.S.C. § 521(4).

There is no evidence that Joan Tunink had intent to defraud her creditors. The trust was created more than seven years prior to the chapter 7 bankruptcy filing. However, it is not necessary to find an intention to defraud creditors to reach the assets of the trust. Restatement (Second) Trusts § 156, comment a. Cf., Barash v. Morris (In re Morris), 151 B.R. 900 (C.D. Ill. 1993) (self-settled trust was invalid and also void under state statute because made with intent to defraud creditors).

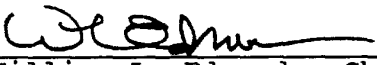
A person with a remainder interest in property does not have a present possessory interest until the termination of the

life estate, but remainder interests are alienable. Archer v. Jacobs, 125 Iowa 467, 101 N.W. 195, 197 (1904). The life tenant of the trust property is still living. The trustee may not partition the property during the life tenant's lifetime. Ward v. Meredith, 186 Iowa 1108, 173 N.W. 246, 249 (1919); Weddle v. Nunley (In re Weddle), 43 B.R. 415 (Bankr. W.D. Va. 1984). However, Joan Tunink's interest in the trust is property of the estate, and Joyce A. Masching, as trustee, must deed or assign the interest to the bankruptcy trustee.

ORDER

IT IS ORDERED that the trustee's motion for summary judgment is granted. Judgment shall enter that Joan F. Tunink's beneficial interest in the trust created by her on December 11, 1985 is property of the estate. Joyce A. Masching shall deed or otherwise turn over Joan F. Tunink's interest in the trust to Donald H. Molstad, bankruptcy trustee.

SO ORDERED ON THIS 22nd DAY OF APRIL, 1994.



William L. Edmonds, Chief Bankruptcy Judge

I certify that on 4-22-94 I mailed a copy of this order and a judgment by U. S. mail to: Donald H. Molstad, Wil Forker and U. S. Trustee. *f*

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FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

FILED
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NORTHERN DISTRICT OF IOWA

JAN 10 1995

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JOAN F. TUNICK,

CHAPTER 7
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BARBARA A. EVERLY, CLERK

Debtors.

Adversary No. 93-5178XS

DONALD H. MOLSTAD, Trustee,

Plaintiff,

vs.


JOYCE A. MASCHING

Defendant.

SATISFACTION OF
JUDGEMENT

COME NOW, plaintiff and satisfies the judgement enter on April 22, 1994
in the above caption matter.

DATED January 6, 1995


Donald H. Molstad, Trustee 3755
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Recorded:
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